IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 6523 of 2000

with

CRIMINAL MISC.APPLICATION No 1722 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BIPIN SHANTILAL PANCHAL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 6523 of 2000

MR AD SHAH for Petitioner

MR ND GOHIL, APP for Respondent No. 1

MR DN PATEL for Respondent No. 2

2. Criminal Misc.ApplicationNo 1722 of 2001

MR BB NAIK for Petitioner

MR ND GOHIL, APP for Respondent No. 1

MR DN PATEL, for Respondent No. 2

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 01/05/2001

CAV COMMON JUDGEMENT

1. Rule. Service of Rule is waived by ld. APP Mr. N.D.Gohil for Respondent No.1 State and ld. Spl.P.P. Mr. D.N. Patel for Respondent No.2 Director of Revenue Intelligence (DRI for short) in both these applications.

2. Both these Cri. Misc. Applications are preferred under sec. 439 of CrPC praying bail by the petitioners-accused of Sessions Case No. 162/94 pending in the Court of ld. Additional City Sessions Judge, Ahmedabad. Since in both the applications similar points are involved, they are heard and disposed of by this common order.

3. The petitioners of both these application i.e. Cri.Misc. Application No. 6523/2000 and 1722/2001 are facing trial of the offences punishable under sections 22 & 24 of the Narcotic Drugs & Psychotropic Substances Act,1985 read with section 120B of IPC and section 29 of the Narcotic Drugs & Psychotropic Substances Act,1985. (hereinafter referred to as the "NDPS Act"). Both these petitioners had prayed earlier for bail pending trial on more than one occasions before this Court and before the Sessions Court. Sessions Case No. 162/94 pending in the Court of ld. Addl. City Sessions Judge, Ahmedabad, is a commenced trial and some witnesses are also examined. The petitioners came to be arrested for the alleged offences on 8.11.1993 and till then, they are in custody. Some and substance of these petitions is that though their bail plea had been rejected earlier, they should be enlarged on bail as the trial is protracted for very long period in view of the right flowing from Article 21 of the Constitution. An undertrial languishing in jail for no fault on his part, atleast should be released on bail, if it is not possible or practicable to close the trial or to terminate the proceedings considering the right of speedy trial embodied in Article 21 of Constitution. In some cases, enlargement of accused on bail may be necessary to meet the requirements of Article 21, is the backbone of the submissions advanced by ld. counsel appearing for the petitioners.

4. Ld. Spl.P.P. Shri D.N.Patel appearing for department of Deputy Director-Directorate of Revenue

Intelligence - respondent no.2 and ld. APP Mr. Gohil appearing for respondent no.1 State have resisted the bail plea and it is argued that considering the ratio of various decisions of the Apex Court, the present accused are not entitled to bail under the alleged right following from Article 21. As it happens in many cases, parties' counsel have placed their reliance mainly on same judgments cited and have tried to interpret the ratio and observations of the Apex Court from their point of view.

5. It is the case of the prosecution that on receipt of specific information, officers of Directorate of Revenue Intelligence (hereinafter referred to as " DRI") had intercepted export consignment on 4.11.1993 at Air India Warehouse, Mumbai. Consignment was booked from Air Cargo Complex, Ahmedabad by one M/s Advance Exports, Ahmedabad and was meant for export to Nairobi. Consignment was examined minutely and it was found that it contained Methaquolone tablets popularly known as "Mandrex Tablets". According to the prosecution, these Mandrex Tablets weighing about 162 kgs. were seized in view of the provisions of the NDPS Act. It is pleaded by the prosecution that during follow-up action, certain statements of different individuals were recorded and some search was carried out at the residence of Dr. Bipin Panchal- petitioner of Cri.Misc. Application No. 6523/2000 on 5.11.1993. Some incriminating documents as well as export seal were sized and statement of accused Bipin Panchal was recorded after interrogation on 6.11.1993. DRI had investigated the offending act by recording statements of various persons and there were different seizures whereby Mandrex Tablets came to be seized on or about 12th & 13th January,1994. It is also the case of the prosecution that number of other incriminating documents were seized and ultimately, complaint came to be filed against the accused persons. Sample drawn from Seizure made by DRI were sent to Forensic Science Laboratory, Ahmedabad for testing etc. which confirmed the presence of Methaquolone in the said sample. In short, the petitioners are from the group of accused facing trial of conspiracy to manufacture, possess and export the Methaquolone Tablets viz. Mandrex Tablets. Petitioner Bipin Panchal, as per the say of the prosecution, is the main accused.

6. So far as petitioner-accused Bipin Panchal is concerned, he has preferred Cri.Misc. Application No. 3122/93 before the City Sessions Court and the same was rejected by the ld. City Sessions Judge vide order dated 4.2.1994. Said petitioner had also submitted an

application for bail before this Court and the same was also rejected. Thereafter, petitioner Bipin Panchal had preferred Special Leave Petition No. 1402/94 before the Apex Court and the same was also rejected. In the month of July,1994, prosecution applied to join other persons as accused in exercise of powers under sec. 319 of CrPC and the trial Court, vide order dated 4.1.1996, directed to join one Amrut Soni @ Mama and Aniruddhasinh Jadeja as accused in this case. As accused Aniruddhasinh was not available on the day of framing of charge, ld. Addl. City Sessions Judge, Ahmedabad, after considering all the papers, framed charge against 8 accused. Thereafter, on 13.3.1997, said Aniruddhasinh was apprehended at International Airport. Bail plea of this accused Aniruddhasinh was accepted by the High Court and he was ordered to be enlarged on bail vide order dated 8.4.1997. Said accused Aniruddhasinh had also preferred discharge application before the Court of ld. Addl. Sessions Judge, Ahmedabad and on consideration of relevant material, the order discharging accused Aniruddhasinh came to be passed on 12.5.1997. The said order of discharge was challenged before the High Court of Gujarat vide Cri. Revision Application No. 472/97 and on 22.10.1997, the order of stay of trial was obtained by prosecution in the said Revision Application. Ultimately, said Cri. Revision Application was allowed and accused Aniruddhsinh was joined as an accused vide order dated 5.5.1998. Ultimately, fresh charge was framed by the trial Judge on 13.7.1998.

7. Accused Aniruddhasinh applied before the trial Court to drop proceedings against him on 11.3.1999. The said application was rejected by the trial court on the very same day. So, accused Aniruddhasinh moved the High Court by preferring Cri. Misc. Application No. 2284/99 and the High Court, stayed the proceedings of trial vide order dated 9.4.1999. Thereafter, vide order dated 23.9.1999, High Court discharged the accused Aniruddhasinh Jadeja.

8. Mr. A.D.Shah, ld. Senior Counsel appearing for petitioner accused Bipin Panchal has submitted that the Supreme Court of India, while rejecting the application for bail filed by the petitioner, had given direction to expedite the trial vide order dated 8.1.1996, but as referred hereinabove, because of other ancillary proceedings and intervening stay, the trial was not concluded and the petitioner was languishing in jail since many years. So, he moved another application for bail before the High Court being Misc. Criminal Application No. 2898/99 which also came to be rejected

by the High Court vide order dated 29.10.1999. The order of the High Court was challenged before the Apex Court by filing Spl.Leave Petition (Criminal) No. 223/2000. Meanwhile, ld. Addl. City Sessions Judge again framed fresh charge against original accused nos. 1 to 7 on 8.2.2000. Supreme Court of India, while disposing of aforesaid SLP (Cri.) No.223/2000, passed the following order, on 31.3.2000:-

" As the Special Judge who is trying the case has reported to us that he reasonably expects to close the trial within six months, we dispose of this Special Leave Petition permitting the petitioner to move for bail again in case the trial is not closed within six months."

Prosecution, while recording evidence of Mr. Daniel Rajkumar Wellington,(P.W.23, Exh.301), prosecution wanted certain documents to be exhibited and defence objected to the admission of said documents. Objection raised by the defence was sustained by the trial Judge and trial Court refused to take/ exhibit documents intended to be exhibited and taken on record. This order of trial Judge dated 16.8.2000 came to be challenged by the complainant before the High Court by filing Spl.Criminal Application No. 789/2000. On 11.9.2000, High Court issued notice and stayed further proceedings of Sessions Case No. 162/94. This Spl. Criminal Application No. 789/2000 is pending before this Court. According to the petitioner Bipin Panchal, he has been languishing in jail for more than seven years and yet trial is not over. Grievance of the petitioner is that though the Apex Court has earlier expedited the trial vide order dated 8.1.1996 and thereafter vide order dated 31.3.2000 observing that the trial should be over within a period of six months, trial has not proceeded further satisfactorily. Considering number of witnesses to be examined and multiplicity of ancillary proceedings, suggests that it is not possible for the petitioner to assess as to when trial will conclude. Mr. Shah has submitted that the prosecution relies on the evidence of 144 witnesses and after a period of almost more than seven years, less than 50% of witnesses could be examined. Mr. Shah has submitted that considering the order of the Apex Court dated 31.3.2000, this application is moved again for bail. Mr. Shah has taken me through certain observations made by the Apex Court in number of decisions. I would like to refer some of the decisions relied on by ld. Senior Counsel Mr. A.D.Shah for the petitioner-accused:-

(1) "Common Cause"- A Registred Society v/s Union of India, (1996) 6 SCC 775.

(2) "Common Cause"- A Registred Society v/s Union of India, (1996) 4 SCC 33.

(3) Rajdeo Sharma (I) v/s State of Bihar, (1998) 7 SCC P.507.

(4) Rajdeo Sharma (II) v/s State of Bihar, (1999) 7 SCC P.605.

(5) Anilkumar Gandhi and others v/s N.C. B. and others, 1992 CrLJ 1703

(6) A.R.Antulay v/s R.S.Nayak, 1992(1) SCC 225.

9. Mr. Achint Navinbhai Patel - petitioner of Cri. Misc. Application No. 1722/2001, has also prayed for bail pointing out the facts stated herein above. He has specifically submitted that he had applied for grant of bail before the trial Court, High Court and the Apex Court, but the said applications have been rejected. Because of protraction of trial, petitioner-accused Anchit has again approached this Court for bail by filing Cri.Misc. Application No. 5397/1999 which was heard and rejected by this Court (Coram: R.P.Dholakia,J) vide order dated 10.12.1999. He had moved the Apex Court by filing Special Leave to Appeal against the order of this Court dated 10.12.1999, but the said SLP also came to be dismissed by the Apex Court vide order dated 1.9.2000. Mr.B.B.Naik, ld. counsel appearing for the petitioner-accused Mr. Achint Patel has pointed out that while dealing with other matters pertaining to this very crime filed by accused Bipin Panchal, the Apex Court, vide its order dated 22.2.2001, has observed that:-

" Now, for disposal of the present application we may state that there is no point in our granting further time to the trial court to complete the trial. It is for the trial court to complete it as early as possible. But, we would not do anything to deprive the accused in custody of his right to move for bail on account of delay thus far occasioned. The bail application would be disposed of by the Court concerned on its own merits. With the above

observations, we dispose of this application."

10. Grievance of ld. counsel Mr.Naik is that even today, trial is not completed and it is not known to the petitioner that when trial would be completed by the trial Court. He has also tried to point out the complexity of the facts and nature of evidence against accused Achint Patel. The petitioner-accused Achint had prayed for bail before the trial Court and had pointed out relevant part of the order passed by the Apex Court on 31.3.2000. Relying on the contents of the order passed by the trial Judge rejecting the bail application, ld. counsel Mr. Naik has submitted that the trial Judge is of the view that accused could have been granted bail. Trial Judge, in its order dated 10.11.2000, has stated that:

" I may state that trial has begun, yet it is not completed till now. Neither accused nor prosecution is at fault for the delay. In the circumstances, such application should have been allowed, but here as observed by the High Court, the accused is actively involved in huge quantity of contraband articles. .... There is no guarantee when the matter will be completed, but the circumstances are beyond the control of the Court and the prosecuting agency ....".

Mr.Naik has submitted that feeling aggrieved with the order passed by the trial Court, the present plea of bail is raised before this Court in view of the right of speedy trial embodied in Article 21 of the Constitution. He has placed reliance on all the judgments cited by ld. Senior Counsel Mr. A.D.Shah and has further submitted that ratio propounded in the decision in the case of Supreme Court Legal Aid Committee (supra) can squarely be applied to the present case. Pressing his reliance on on the decisions; viz (i) Dadu @ Tulsidas v/s State of Maharashtra (2000)4 Crimes 124 (SC), and (ii) Smt. Akhtari Bi v/s State of M.P., JT 2001 (4) SC 40, (iii) Supreme Court Legal Aid Committee representing Undertrial Prisoners v/s Union of India & Others, (1994)6 SCC 731,and (iv) Shaheen Welfare Association v/s Union of India and Others, AIR 1996 SC 2957, ld. counsel Mr. Naik has submitted that speedy justice is a fundamental right flowing from Article 21. Therefore, where nobody could be held responsible for protraction of trial or playing dilatory tactics, accused atleast should be

enlarged on bail. Apex Court had requested the Chief Justices of the High Courts where criminal cases are pending for more than five years, to take immediate effective steps for their disposal by constituting regular and special Benches for that purpose. Convict lady was ordered to be enlarged on bail by placing order of conviction and sentence passed against her in abeyance. The criminal appeal pending before the Madhya Pradesh High Court was considered as "trial deemed to be continuing despite conviction."

11. Spl.P.P. Mr. D.N. Patel has tried to distinguish the decisions relied upon by the counsel appearing for the petitioners, stating that most of the cases relied on by the petitioners are for the offences punishable under the IPC or which can be termed as less grievous offences than the charges which the present petitioners are facing. Quoting certain observations of the Apex Court from the decisions of the Apex Court where bail plea of the accused of the offences punishable under the NDPS Act was rejected, has submitted that each offence punishable under the NDPS Act should be viewed with all sensibility and caution. Strength of the country, mental and physical health of coming generation of the nation along with international illicit trafficing of drugs etc. should be considered on different footing. While exercising judicial discretion, the Court has to consider many aspects touching the crime, its gravity, quantum of punishment vis-a-vis other aspects as to scope for the accused to jump the bail or to play with or influence the witnesses etc. Period consumed on account of stay against the proceedings granted by the higher forum should be excluded while considering the alleged period of delay or protraction. Maximum punishment prescribed is relevant for the purpose. Looking to the quantity of Mandrax tablets seized by the Investigating Agency, period of 7 years or more cannot be said to be unreasonably long period. Mr. Patel has submitted that verdict of Apex Court while dealing with Common Cause Cases (supra) & Rajdeo Sharma Cases (supra), should be considered in proper perspective. These decisions are mainly dealing with the cases where punishment prescribed is less than 7 Years. Decision of the Apex Court in the case of Shaheen Welfare Association (supra), helps the prosecuting agency. Trial is now proceeding day to day basis and the prosecution is examining witnesses regularly. According to Mr. Patel, decision in the case of Supreme Court Legal Aid Committee (supra) does not help the the petitioner. On the contrary, on more than one occasions, bail plea of both the petitioners has been rejected by the Apex Court on merits. So, embargo of

section 37 of the NDPS Act would come in the way of petitioners even while praying bail on account of alleged protraction of trial. Section 37 of the NDPS Act is a separate provision and language of section 37 of the NDPS Act itself suggests that unless the Court is of the view that there is no scope to hold the accused guilty, the application for bail either under CrPC or under any other law can not be considered. Some portion of vital period is spent by the Investigating Agency in dealing with technical objections raised by the defence side during the trial and in handling other proceedings. Now, the prosecuting agency would be able to conclude the trial at the earliest in view of the decision of the Apex Court dated 22.2.2001 in Cri. Misc. Petition No. 862/2001 in Petition for Special Leave to Appeal (Cri.) No. 223/2000. Respondent Prosecuting Agency had moved the Apex Court by filing Cri.Misc. Petition No. 223/2000 for modification. So, there will be no scope for further protraction of trial. So, in the nutshell, according to Mr. Patel, bail applications preferred by both the petitioners should be dismissed. In response to the query raised by this Court, ld. Spl.P.P. Mr. Patel has objected grant of even temporary bail on stringent conditions viz. to mark presence before responsible officer of respondent no.2 DRI frequently viz. even on the day on which they are not required to appear before respondent no.2.

12. I have gone through all the decisions cited by the counsel appearing for the parties and their scholarly submissions on legal as well as procedural aspects of the matter coupled with right of speedy trial embodied in Article 21 of the Constitution in special reference to various cases on different set of facts. ld. Spl.PP Mr. D.N.Patel has hammered that in view of the observations of the Apex Court in the case of A.R.Antulay (supra) and Rajdeo Sharma(II) (supra) (paras 12, 13 & 17), this Court should hold that looking to the peculiar set of facts, the petitioners should not be enlarged on bail on the alleged right flowing from Article 21 of the Constitution. Ld. Spl.PP Mr. Patel has placed further reliance on the following decisions:-

(i) Rajdeo Sharma v/s State of Bihar (supra)
(1998 SCC (Cri.) 1692)

(ii) "Common Cause" a Registered Society
through its Director v/s Union of India
and othrs (supra), (AIR 1996 SC 1619).

(iii) Dadu @ Tulsidas v/s State of Maharashtra

(supra);

(iv) Anil Kumar Gandhi and others v/s N.C. B. (supra) (Paras-9 & 12)

13. After giving anxious consideration to all the the factual as well as legal aspects brought before me, it is not a matter of dispute that the petitioners are facing trial of a very serious offence prescribing 20 Years of R/I and very heavy amount of fine. Apprehension of jumping bail, on this lone count, is more likely. It can legitimately be said that if liberty is made available, then accused of such crime may try to influence the witnesses. It is also pertinent to note that the Sessions Court has started recording evidence and trial has commenced, but the fact remains that both the petitioners are in judicial custody since more than Seven years. I agree that petitioner Bipin Panchal has not approached the Court of Sessions for bail, after dismissal of his SLP on 31.3.2000, but it is rightly submitted by ld. Senior Counsel Mr. Shah that the petitioner had approached this Court for bail considering the provisions of Article 21 of the Constitution of India as he was languishing in jail for no fault on his part in protracting the trial. So,as per the observations of the Apex Court, he has approached this Court for the same plea and it is not necessary to go before the Court of Sessions. He, considering the concurrent jurisdiction and the fact that other co-accused who had approached Court of Sessions for bail on the strength of very observations of the Apex Court and failed, has therefore pleaded that the application preferred for bail before this Court, can be considered. So, I am not inclined to dismiss the application of the petitioner accused Bipin Panchal on this technical submission made by ld. Spl.PP Mr. Patel.

14. The petitioners are undertrials for more than seven years. So, they have yet not spent even 50% of the maximum period of punishment prescribed. So, they would not be entitled for bail on account of delayed trial. This submission of Mr. Patel would not sustain in light of the decision of the Apex Court in the case of Supreme Court Legal Aid Committee (supra), because the Apex Court, after considering all the relevant decisions i.e. (i) Hussainara Khatoon (iv) v/s Home Secy., State of Bihar, 1980(1) SCC 98, (ii) Raghubir Singh v/s State of Bihar, 1986(4) SCC 481, and (iii) Kadra Pahadiya v/s State of Bihar, (1983)2 SCC 104, has observed that Articles 14, 19 and 21 sustain and nourish each other and any law depriving a person of personal liberty must

prescribe procedure which is just, fair and reasonable. While categorising the offences punishable under the NDPS Act, the Apex Court has considered minimum period of imprisonment while granting bail to the undertrial prisoners. When this Court is not considering the question of closure of proceedings or termination of trial, the maximum period of punishment prescribed for a particular offence, would not be very relevant otherwise, it can be argued that undertrials of the offences punishable under NDPS Act where the maximum punishment prescribed is R/I for 20 Years, cannot be enlarged on bail till they spent about 10 years in custody as undertrials. Sensitivity attached to the crime and gravity are relevant aspects, but whether such offender can be put behind the bar for 19 Years 11 Months & 29 Days, is the question to be decided. The Apex Court, while dealing with the case of Supreme Court Legal Aid Committee (supra), has considered each aspect including the the provisions of Section 37 of the NDPS Act. Ld. Spl.PP Mr. Patel has tried to emphasize that as the bail plea of both these petitioners was entertained and rejected on merits on more than one occasions, they cannot be enlarged on bail in view of the embargo of Section 37 of the NDPS Act in view of the observations of the Apex Court in the case of Supreme Court Legal Aid Committee (supra). This submission is not sustainable. The Apex Court has, in the aforesaid decision, said:-

" We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh v. State of Punjab. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceedings altogether, as held by a Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak, release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that

deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose."

15. While dealing with the case of undertrials languishing in jail facing trial for the offences punishable under TADA Act, the Apex Court, in the case of Shaheen Welfare Association (supra), has observed in para-6 that:-

"6. ... ... We are conscious of the fact that even the trial of ordinary criminal cases does take some time because of the courts being overloaded with work and the concept of a speedy trial in the case of TADA cases must be viewed in the context of pendency in relation to criminal trials also. But when the release of under-trials on bail is severely restricted as in the case of TADA by virtue of the provisions of Section 20(8) of TADA, it becomes necessary that the trial does proceed and conclude within a reasonable time. Where this is not practical, release on bail which can be taken to be embedded in the right of a speedy trial may, in some cases, be necessary to meet the requirements of Article 21."

16. So, when the persons have been found deprived of their personal liberty for a considerable length of time without any prospects of trial being concluded in near future, while dealing with bail plea by such persons, the Court has to consider the privilege inbuilt in Article 21. Therefore, earlier rejection of bail plea of the present petitioners on merits attracting embargo of Section 37 of NDPS Act, would not help DRI in putting resistance. Illicit trafficing of dangerous narcotic drugs and/or psychotropic substances is the worry of the whole Globe and widespread victims have become an encouraging factor to the organised crime in this field. So, in view of the tough stand taken by DRI while resisting the present petitions and the concern expressed by the ld. trial Judge while rejecting the bail plea of accused Achint Patel, if this Court intends to exercise discretion in favour of the present petitioners, shall have to consider other relevant peripheral aspects. Learned trial Judge on one hand has accepted that this is a case wherein such applications should have been allowed, but in view of the observations of the High Court as to the nature of the activities involving huge quantity of contraband articles, the bail plea was not accepted by the ld. Trial Judge. So far as the petitioner Achint Patel is concerned, even as per the case of the prosecution, he is being tried as one of the co-conspirator of the crime under Section 29 of the NDPS Act. Each conspirator if found guilty of the offence charged against him, is otherwise liable for equal punishment. The trial Court found that this is an exceptional case and, therefore, it would not be desirable or justifiable to use the discretionary powers. It seems that the quantum of punishment and sensitivity of the crime has weighed much with the trial Judge. The Apex Court, while dealing with the cases (i) Shaheen Welfare Association, and (ii Supreme Court Legal Aid Committee (supra), was considering the cases of undertrials facing trials of very grave offences and sensitive areas covered mostly by organised criminals. Even then, the Apex Court has made certain observations referred to herein above. When an undertrial prays for bail on the ground that he is languishing in jail for considerable length of time without any prospects of trial being concluded in a near future and if Court finds that for no fault on the part of the accused or prosecution or both, delay caused in culminating the trial would be unreasonably long or if it is found that protraction of trial resulted in to unreasonable languishment, then the Court has to think about the enlargement of the undertrial concerned on bail by

imposing more and/or variety of stringent conditions which would be able to take care of the apprehensions expressed by the prosecution. These conditions, by way of device, shall have to be evolved in view of the set of facts and nature of apprehensions expressed against the accused. When key witnesses are closely related or connected with the prosecuting agency and the bail court finds that many key witnesses might have interest in the result favourable to the prosecution, then scope of tampering with such witnesses or inducement would be very limited. If such contingencies are taken care of, then such apprehension should not be given much weightage. The cases where borderline or independent key witnesses are large in number, then the ability to influence such witnesses on the part of the accused needs careful consideration to strike the balance.

17. Decision of the Apex Court in the case of Rajdeo Sharma v/s State of Bihar, reported in (1998) 7 SCC P.507, deals with speedy trial. This decision is known as Rajdeo Sharma (I) decision. This decision relied on by the ld. counsel for the petitioners, if construed in proper perspective, it helps the prosecuting agency to some extent. As per the precedent and basic principle of jurisprudence, when the Apex Court has considered the very decision at any subsequent stage and has supplemented the earlier decision with modification or other qualifications, then it is the duty of the court to appreciate both the decisions. In the cited case, Apex Court also considered the proposition laid down in the case of Abdul Raheman Antulay v/s R.S.Nayak, reported in (1992) 1 SCC 225 and considered all relevant aspects as to delay in conducting trial. Gist of decisions of Rajdeo Sharma (I) & (II) (supra), if considered in light of the facts of the bail application on hand, I am of the view that these decisions would help the petitioners in light of the background of other referred decisions. While dealing with the case of Rajdeo Sharma (I) (supra), the Apex Court has considered following decisions which are relevant for our purpose:- (i) "Common Cause" A Registered Society (I), (ii) "Common Cause" A Registered Society (II), (iii) Hussainara Khatoon (IV), and (iv) Abdul Raheman Antulay (all supra)

18. In the case of "Common Cause" A Registered Society (Supra), the Apex Court has said that pendency of criminal proceedings for long period operates as engine of oppression. Depending on nature of cases, accused may be released on bail or appropriate orders for discharging or acquitting the accused, can be passed. Considering the scope to release the undertrial on bail reflected in

both the "Common Cause" cases (supra), it is clear that no party should be put to advantage where pendency of proceedings is wholly or partly attributable to dilatory tactics adopted by it. Where the proceedings are stayed by the higher court, the same also cannot be treated as disadvantage or adverse to either. Offences affecting public health, safety, convenience, decency and morals as listed in Chapter-14 of IPC, or such offences under any other law for the time being in force, bail discretion should not be exercised mechanically and the Court should strike the balance. I would like to quote some part of the decision of the Apex Court in Rajdeo Sharma (1) (Supra). Para-8 of said decision reads as under:-

> "8. The entitlement of the accused to speedy trial has been repeatedly emphasized by this Court. Though it is not enumerated as a fundamental right in the Constitution, this Court has recognized the same to be implicit in the spectrum of Article 21. In Hussainara Khatoon (I) v/s Home Secy., State of Bihar, the Court while dealing with the cases of undertrials who had suffered long incarceration held that a procedure which keeps such large number of people behind bars without trial for so long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with the requirement of Article 21. The Court laid stress upon the need for enactment of a law to ensure reasonable, just and fair procedure which has creative connotation after Maneka Gandhi case in the matter of criminal trials."

19. While dealing with A.R. Antulay's case (supra), the Constitutional Bench of the Apex Court has dealt with many aspects. Relevant aspects for our purpose are the guidelines reflected in paras 85 & 86 of the judgment. In para-85 of the aforesaid decision, the Apex Court has observed as under:-

> "85. ... ... In cases, where quashing of charges/ convictions may not be in the interest of justice, it shall be open to the Court to pass such appropriate orders as may be deemed just in the circumstances of the case. Such orders may, for example, take the shape of order for expedition of trial and its conclusion within a particular prescribed period, reduction of sentence when the matter comes up after conclusion of trial and conviction, and so on."

Phrase "and so on" is indicative of powers to issue further directions including enlarging the accused on bail on demand or otherwise. Obviously, it can extend time for conclusion of trial. The Apex Court has not extended the time in the case on hand. Para-86 of the judgment stipulates propositions emerged for the discussion as mentioned therein. The Apex Court has said that these propositions are meant to serve as guidelines and Apex Court has forewarned that these propositions are not exhaustive. Right to speedy trial flowing from Article 21 encompasses all stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. In sub-para (3) of para-86 of the aforesaid judgment, the Apex Court has said:-

"(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should not be subjected to unnecessary or unduly long incarceration prior to his conviction.

(b) xxx xxx xxx

(c) xxx xxx xxx

Delay is a known defence tactic. Ld. Special PP Mr. D.N.Patel for the DRI has, therefore, shown anxiety on behalf of the DRI that they are anxious to see that stay granted by this Court is either vacated or any other appropriate order is passed at the earliest so that trial can get some momentum. One should also consider that there may be cases where prosecution for whatever reasons also indulges in delaying tactics. Therefore, in every case, where right to speedy trial is alleged to have been infringed, the question to be raised and answered is as to who is responsible for the delay ? These are the exact words by the Apex Court in sub-para (4) of para-86 of the aforesaid judgment. Undisputedly, the delay in present case is not attributed to the petitioners.

20. One important aspect which struck to my mind while I was attentive to the submissions of ld. Spl.PP Mr. D.N. Patel appearing for DRI, is that according to DRI, period of 7 1/2 Years approximately as an undertrial is a long period and, prima facie, this period can be said to be unreasonably long period. Even DRI itself undisputedly accepts that the trial is unreasonably

protracted, but according to the prosecuting agency, the petitioners should not find fault of the prosecuting agency for that. Prosecuting agency was bound to take certain steps and further proceedings to the higher forum with a view to see that all evidence collected by it is tendered and admitted during trial. Period of maximum punishment prescribed under the Act is focussed by ld. Spl.P.P. Mr. Patel. By giving flashes on the sensitivity of the offences and modus adopted by the accused persons, Mr. D.N. Patel has tried to submit that in no event, any period till its logical end can be termed as unduly long period for trial in such a serious and complex case. While quoting sub-para 5 & 8 of the judgment of the Apex Court in the case of A.R. Antulay (supra), Mr. Patel has submitted that this Court has to consider all the attendant circumstances. I would like to quote sub-paras 5 & 8 of para-86 of the aforesaid judgment for the purpose. The Apex Court has said therein:-

"(5) While determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on- what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one."

Sub-para (8) of para-86 says:-

(8) Ultimately, the court has to balance and weigh the several relevant factors "balancing test" or "balancing process" and determine in each case whether the right to speedy trial has been denined in a given case." (emphasis supplied).

Apex Court has observed that it is neither advisable nor practicable to fix any time limit for trial of offence. Any such rule is bound to be a qualified one. Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under the Constitution, has tobe read in light of the concept of speedy trial. In light of guidelines issued by the Apex Court and to supplement proposition laid down by the

Constitutional Bench in Abdul Raheman Antulay's case (supra), while dealing with Rajdeo Sharma's case (supra), the Apex Court has issued certain directions. These directions mainly deals with the trials concerning the offences punishable (i) for imprisonment for a period not exceeding 7 Years, and (ii) the cases where the accused have remained in jail as an undertrial for a period not less than half of the maximum period of sentence/ punishment prescribed for the offence, etc.

21. Considering the ratio in the cases of (i) Satya Brat Gain v/s State of Bihar, 2000 Cr.L.J.2296 and Akhtari Bi v/s State of M.P., JT 2001 (4) SCC 40, it can be legitimately inferred that the submissions advanced by the petitioners that period of 7 1/2 Years undergone by them in the judicial custody as an undertrial can be termed as unduly long and, therefore, this Court has to think positively in response to the bail plea by the petitioners. Constitutional validity scrutinised by the Apex Court as to Section 32-A of the NDPS Act while dealing with the case of Dadu @ Tulsidas v/s State of Maharashtra, (2000) 8 SCC 437, has scanned Section 32-A and Section 37 of the NDPS Act in light of the provisions of Article 21 of the Constitution of India. The Apex Court has observed in para-17 in the aforesaid judgment as under:-

> "17. Not providing atleast one right of appeal would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statute and when conferred, a substantive right. Providing a right of appeal but totally disarming the court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits atleast in many High Courts. As the present is not the occasion to dilate on the causes for such delay, we restrain ourselves from that exercise. In this view of the matter, the appellate powers of the court cannot be denuded by executive or judicial process. "

22. During the course of submissions, it was pointed out by ld. Spl.PP Mr. Patel that the trial Court is now dealing with the matter against the petitioners on day to

day basis and the same has substantially progressed. Responding to this submission, the petitioners have denied that trial has geared up. There is a long list of witnesses to be examined and even 50% of the witnesses are yet not examined. Because of disruption on account of last earthquake, many trials have been derailed. It is submitted that because of one reason or the other, for no fault on the part of the either side, there is no hope as to culmination of trial in a near future. According to ld. Senior Counsel Mr. A.D.Shah, even when DRI had obtained ex-parte modification by filing Criminal Misc. Petition No. 862/2001 in SLP (Cri.) No. 223/2000. The Apex Court had not granted further time to trial Court to complete the trial. Direction given by the Apex Court may give rise to some other or further proceedings, is also one of the submissions. Apex Court has observed that:-

" Now, for disposal of the present application we may state that there is no point in our granting further time to the trial court to complete the trial. It is for the trial court to complete it as early as possible. But we would not do anything to deprive the accused in custody of his right to move for bail on account of the delay thus far occasioned. The bail application would be disposed of by the court concerned on is own merits.

I am of the view that above observations have impliedly accepted the right to continue bail plea agitated by the petitioner Bipin Panchal on account of protraction of trial.

23. Irrespective of the pronouncement of the judgments in other cases decided by the Apex Court or High Courts, it can be said that in the case pending against the present petitioners, bail plea on account of protraction of trial under the right embodied in Article 21 of the Constitution was agitated before the trial Court, thereafter before this Court and in turn before the Apex Court. When it was agitated before the Supreme Court by moving SLP (Cri.) No. 223/2000, the Apex Court was aware about the sensitivity of the crime and its gravity. Even then, bail plea was not rejected on the count. At the end of sixth month from the date of order i.e. 31.3.2000, in view of the liberty granted by the Apex Court, the petitioner Bipin Panchal was entitled to raise bail plea on the same grounds. I am told that Presiding Officer of the Court concerned had not obtained any extension from the Apex Court, at the relevant point of time. It seems that the prosecuting agency has tried to get extension from the Apex Court by moving Cri.

Misc. Petition No. 862/2001 which has been disposed of by making certain observations vide order dated 22.2.2001. One of the observations, for the purpose, is quoted in para-22 herein above.

24. The words " Court concerned" and " on its own merits" in the above order, include this Court as well as the trial Court having concurrent powers to deal with the bail plea under sec. 439 of CrPC. As the petitioner Bipin Panchal had approached the Apex Court against the order passed by this Court, he has agitated bail plea again before this Court and petitioner Achint Patel, in view of the observations made in the order dated 31.3.2000, had approached the trial Court where he has failed. This Court is called upon to determine whether undue delay has occurred resulting into violation of right of speedy trial and considering the period of around 7 1/2 Years, the court if accepts that right embodied under Article 21 has been violated, then other attending circumstances including nature of offence, number of accused and witnesses, documents etc. are very relevant. Significance of maximum punishment prescribed for the offence, sensitivity of the crime and impact of the bail order on the society remain relevant in the context of total period undergone as undertrial prisoner. If Court finds that it is not possible to evolve any device, by imposing stringent conditions, only then such aspects should be given more weightage. The facts and circumstances of each case would provide "scales". On objective, mental evaluation and without putting it in mathematical percentage, the Court has to strike the balance otherwise in no sensitive or grave offence, accused can get bail under the right emerged because of violation of right to speedy trial. In the instant case, considering (i) number of witnesses remained to be examined, (ii) other facts and circumstances emerging from record, and (iii) observations of the Apex Court in the orders dated 31.3.2000 and 22.2.2001, I feel that the other things namely gravity of offence or sensitivity of the crime and other apprehensions as to scope of influencing the prosecution witnesses etc. have very limited role to play. The Court has to think whether these contingencies can be taken care of by imposing appropriate stringent conditions. As discussed earlier, the petitioners have undergone long period of more than 7 Years & 4 Months in judicial custody, in my view, this is a fit case to exercise discretion in favour of the petitioners, not fully but partly. This Court is not asked to direct the trial Court to close the proceedings or to terminate the proceedings and so, maximum period of punishment prescribed would not be of much relevance, in

view of the decision of the Apex Court in the case of Supreme court Legal Aid Committe (supra). In that decision, the Apex Court has held that the liberty of a person without ensuring speedy trial is violative of Article 21. The Apex Court was dealing with the offence punishable under NDPS Act. Observations of the Apex Court indicate that irrespective of statutory embargo of sec.37 of NDPS Act, right visualised by Article 21, has some precedence over such statutory embargo. The petitioners are facing trial for offence where the maximum punishment is life imprisonment, if we do not talk about capital punishment. In the aforesaid decision, the Apex Court issued certain directions. Direction nos. (ii) & (iii) are relevant for the purpose. That -

"With respect to pending cases, we direct as under:-

(i) xxx xxx xxx

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount in no case be less than Rs.50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount. "

25. In the aforesaid decision, the Apex Court has, while enlarging undertrials facing charge of the offences punishable under the NDPS Act, had imposed certain general conditions. As discussed earlier, some special conditions can be imposed which can work as device against the apprehension expressed by the prosecuting agency. This Court could have granted regular bail to the petitioners, but considering the sensitivity of the crime, gravity of offence and the fact that trial is gradually progressing, temporary bail can be the very good alternative. During the course of submissions, Mr. A.D.Shah, ld. Senior Counsel as well as Ld counsel Mr.

B.B.Naik, both appearing for the petitioners-accused have submitted that the petitioners would be satisfied even if they are granted temporary bail and that they are ready to get their presence marked on every alternate day when they have not to attend the criminal trial pending with the City Sessions Court. They are also eager to abide by whatever conditions which may restrict their movement along with other prohibitions. Normally such submissions are not made, but it seems that under the great desperation, this submission appears to have been made. Considering the case against the petitioners, they can be released on temporary bail on certain stringent conditions coupled with usual terms and conditions. I have also considered the reasons given by the Apex Court while granting bail to the accused where sufficient number of witnesses were examined by the trial court, in the case of Dineshkumar Bhatti v/s State of NTC of New Delhi, 2000 AIR SCW 1736. In that case, accused were in judicial custody since 5 Years and 29 out of 59 eye-witnesses were examined. Here in the case on hand, number of eye-witnesses are yet to be examined. So, temporary bail on certain special terms can be granted. In my view, such order, in any manner, would not prejudice either side. It is, however, always open to the prosecution to pray for cancellation of bail by stating cogent reasons.

26. Under the totality of discussion made as above, I am of the view that both these applications require to be allowed partly by releasing petitioners of both the applications on temporary bail. Hence, following order is passed:-

27. Both these applications are partly allowed and petitioner-accused Shri Bipin Shantilal Panchal petitioner of Cri. Misc. Application No. 6523/2000 and petitioner accused Achint Navinbhai Patel- petitioner of Cri. Misc. Application No. 1722/2001, are hereby ordered to be be released on temporary bail for a period of 90 (ninety) days from the date of their release in connection with Sessions Case No. 162/94 pending in the Court of ld. Addl. City Sessions Judge, Ahmedabad for the offences punishable under sec.120-B of the IPC read with Sections 22, 23 & 24 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 on each of them executing a bond of Rs. 1,00,000/ (Rs. One Lakh only) with two sureties of Rs. ONE LAKH each of a person having immovable properties in the State of Gujarat to the satisfaction of the lower Court and subject to the conditions that they shall,

(i) the petitioners shall deposit their passports with the learned trial Judge concerned and if petitioners do not hold passports, they shall file an affidavit to that effect in the form that may be prescribed by the learned trial Judge. In the latter case, the ld. Trial Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within two weeks. If he fails to reply within the said time, the ld. trial Judge will be entitled to act on the statement of the petitioners-undertrials;

(ii) the petitioners shall on being released on temporary bail, not apply for passport after their release and shall supply their 3 Passport size recent photographs within one week from their release to the ld. trial Judge and 2 Passport size recent photographs to the prosecuting agency so that either of the two can instruct the Passport Officer of the concerned region or at the outlet to reduce scope of petitioners obtaining or using another passport in any fictitious name. Trial Court as well as prosecuting agencies are entitled to take appropriate steps in this regard;

(iii) shall mark their presence in the office of DRI, Ahmedabad on every Monday, Wednesday & Friday, once during the office hours. However, the petitioners are exempted to appear before DRI on any of the aforesaid days if they appear before the trial Court on that particular day, as required by the trial Court.

(iv) may furnish bail by depositing cash equal to the bail amount;

(v) shall not deal in the business of pharmaceuticals or any allied products in any manner whatsoever till further orders. There shall also be ban on transportation of pharmaceutical products by them;

(vi) shall not directly or indirectly try to establish contacts with prosecution witnesses and shall not try to influence them.

(vii) shall furnish sureties as ordered of a person having immovable properties in the State of

Gujarat. Trial Court shall verify the genuineness of the solvency tendered at the time of execution of bail bonds;

(viii) shall surrender on expiry of 90th day from the date of their release. It is, however, observed that petitioners will be at liberty to apply for extension of temporary bail before reasonable period of expiry of 90 days, if the trial is not concluded on the date of making such application. In the event of such application being made, the same shall be decided on merits and in accordance with law considering existing circumstances and contingencies;

(ix) not take undue advantage of their liberty or abuse their liberty;

(x) not act in a manner injurious to the interest of the prosecution;

(xi) maintain law and order;

(xii) not leave the local limits of Ahmedabad District without the prior permission of the Sessions Judge concerned;

(xiii) furnish the address of their residence at the time of execution of the bond and shall not change the residence without prior permission of this Court;

(xiv) If case for cancellation of bail is made out and/or if breach of any of the above conditions is committed, the Sessions Judge concerned will be free to issue warrant or take appropriate action in the matter.

(xv) Bail before the Lower Court having jurisdiction to try the case.

Rule is made absolute accordingly in both the applications.

Direct Service is permitted.

Yadi to concerned Police Station.

Dt :1.5.2001 [C.K. BUCH, J]

*rawal.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 6523 of 2000
with
CRIMINAL MISC.APPLICATION No 1722 of 2001

BIPIN SHANTILAL PANCHAL
VERSUS
STATE OF GUJARAT

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 01/05/2001

OPERATIVE PORTION OF COMMON CAV JUDGEMENT

27. Both these applications are partly allowed and petitioner-accused Shri Bipin Shantilal Panchal petitioner of Cri. Misc. Application No. 6523/2000 and petitioner accused Achint Navinbhai Patel- petitioner of Cri. Misc. Application No. 1722/2001, are hereby ordered to be be released on temporary bail for a period of 90 (ninety) days from the date of their release in connection with Sessions Case No. 162/94 pending in the Court of ld. Addl. City Sessions Judge, Ahmedabad for the offences punishable under sec.120-B of the IPC read with Sections 22, 23 & 24 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 on each of them executing a bond of Rs. 1,00,000/ (Rs. One Lakh only) with two sureties of Rs. ONE LAKH each of a person having immovable properties in the State of Gujarat to the satisfaction of the lower Court and subject to the conditions that they shall,

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